SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 913

FLOYD SARISOHN,

Petitioner,

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner seeks review of the judgment of the New York Court of Appeals, highest court of the State, which affirmed unanimously the judgment of the Appellate Division of the Supreme Court, Second Judicial Department, directing that petitioner be removed from judicial office as a Judge of the Suffolk County District Court and be barred from holding judicial office thereafter.

Opinions Below

The opinion of the Court of Appeals, rendered on petitioner's first appeal to that court, is reported in 21 NY 2d 36. The final decision on petitioner's second appeal is reported without further opinion in 22 NY 2d 808. The opinions of the Appellate Division are reported in 26 AD

2d 388; 27 AD 2d 466; and 29 AD 2d 91. A related opinion by the United States District Court for the Eastern District of New York is reported in 265 F. Supp. 455.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 14, 1968. Rehearing was denied on October 9, 1968. The petition for a writ of certiorari was filed on January 6, 1969. The jurisdiction of this Court is invoked by petitioner under Title 28 U.S.C. §1257(3).

Question Presented

Whether petitioner—who was removed and barred from holding state judicial office after due notice of the charges and, as found by the highest court of the State, after "a full hearing" conducted by the Appellate Division "with meticulous fairness"—has any legitimate basis for his claim that he was "denied a fair hearing before an impartial tribunal in violation of his rights, privileges and immunities under the Fourteenth Amendment."

State Constitution and Statutory Provisions Involved

New York State Constitution, Article 6, Section 22, Subdivision i.

"A judge of the courts for the city of New York established pursuant to section fifteen of this article, of the district court or of a town, village or city court outside the city of New York may, in the manner provided by

law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence."

Uniform District Court Act, Section 103, Subdivision (e)

"The appellate division of the supreme court may remove a judge of the district court for cause or retire him for disability after due notice and hearing, under such procedures as may be established by law."

Code of Criminal Procedure, Section 132

"A judge of the courts for the city of New York established pursuant to section fifteen of article six of the constitution, of the district court or of a town, village or city court outside the city of New York may be removed for cause or retired for disability, as provided by the constitution, by the appellate division of the supreme court. The appellate division may in its discretion prohibit a judge or a justice so removed from holding public office, elective or appointive, thereafter. The appellate division shall have power to order the proofs upon any proceedings hereunder to be taken by a referee to be appointed by such appellate division. . . . The appellate division shall also have power on its own motion, or on petition, to investigate or cause to be investigated, the said inferior courts, and the judges or justices thereof, and to designate a justice of the supreme court or to appoint a referee to conduct such investigations, the reasonable expenses thereof to be certified and made a charge in the manner hereinbefore provided."

Statement of the Case

The State Constitution, quoted above, vests jurisdiction to remove a judge of the district court "after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence." Pursuant thereto, five Justices of the Appellate Division, Second Judicial Department, were convened as a court of original jurisdiction to determine the issues raised with respect to nine charges of alleged misconduct by petitioner. Nine other charges had previously been stricken from consideration by the court "without passing on their merits or sufficiency" (Op. Item 12).*

The trial lasted a full week, at which petitioner appeared with counsel, called witnesses in his defense, and testified in his own behalf—except that he refused to testify with respect to the first charge, claiming privilege against self-incrimination and attorney-client privilege (OP. Item 15; *Matter of Sarisohn*, 21 NY 2d 36, 47).

After completion of the trial the court dismissed two of the charges and part of another for insufficiency of evidence, and on the remaining charges found petitioner guilty of a pattern of misconduct which in the court's opinion made it "imperative that [petitioner] no longer be permitted to pass judgment on the rights of litigants" (OP. Item 18; *Matter of Sarisohn*, 27 AD 2d 466, 472).

Petitioner's wrongdoing to the detriment of litigants, counsel, and the integrity of official court records constitutes the factual basis upon which the final judgment of the Court of Appeals rests. On petitioner's first appeal the

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* References preceded by the symbol "OP." refer to the original papers transmitted by the Appellate Division to this Court and itemized in the schedule annexed thereto.

Court of Appeals reviewed the entire case both as to facts and law. The Court found that petitioner had received "a full hearing"; that the Appellate Division had conducted the proceedings "with meticulous fairness"; and that six of the charges—exclusive of the first charge—were established by substantial evidence "well within the range to support a finding of cause for the imposition of sanctions" (*Matter of Sarisohn,* 21 NY 2d 41, 44-47).

With respect to the first charge, as to which petitioner had refused to testify under claims of privilege, the Court of Appeals held that the evidence was inadmissible because it consisted of recorded telephone conversations obtained without complying with the requirements of the New York statute (*Id.* at 42-44). Accordingly, the Court remanded the matter to the Appellate Division with instructions to dismiss the first charge unless other untainted evidence could be supplied to support it; and that, if the first charge be dismissed, to reconsider the disposition to be made "on the basis of the remaining charges" (*Id.* at 48).

After due notice to petitioner and his counsel, who appeared and argued on behalf of petitioner, the court dismissed the first charge and reserved decision to determine the disposition to be made (OP. Item 25). The court then wrote an opinion stating that it completely disregarded the first charge as well as petitioner's claim of privilege; and that petitioner's guilt of the charges sustained by the Court of Appeals "is sufficient ground not only for the removal from his office as a District Court Judge, but also for prohibition from holding judicial office, appointive or elective" (29 AD 2d 91, 93).

The Court of Appeals affirmed unanimously without further opinion (22 NY 2d 808).

REASONS FOR DENYING THE WRIT

An examination of the petition in light of the actual record reveals that petitioner's contention that he was denied a fair trial before an impartial tribunal is propped upon unfounded assumption, creating synthetic issues of deprivation of due process of law.

1.

At page 14 of the petition it is asserted that the Appellate Division:

> ". . . went through the motions of conducting much of the proceeding with superficial 'meticulous fairness'."

And at page 17 the petition charges that the Appellate Division was corrected by the Court of Appeals:

> "for deliberately allowing 'concededly' illegal evidence to form the basis of its finding of guilt."

These are baseless accusations in shocking conflict with the position taken by petitioner's counsel, Mr. Frederic Block, in presenting his contentions at the hearing on the remand. This is what Mr. Block said to the Appellate Division:

> "I would like to note initially that the Court of Appeals did hear and did consider the question of disqualification. I fully concur with the characterization of the proceedings before this honorable bench by the Court of Appeals, that it was conducted with meticulous fairness . . . We do not make the assertion that there is a bias or prejudice as a matter of fact. I don't think that exists. I am confident that it doesn't.

Justice Benjamin: You are contesting the general pattern of the removal proceeding?

Mr. Block: Yes, I am claiming that the procedure established by the Constitution and the statutes is basically violative of constitutional rights" (OP. Item 25, at 17-18).

2.

Another issue sought to be raised by the petition is that the Appellate Division "became personally interested in the outcome, by preferring, as cause for removal" a charge that petitioner had made statements to the press discrediting "all the judges of the Appellate Division and the Court itself"; and that the Appellate Division "predetermined [that the charge] would constitute cause for petitioner's removal from office" (Pet. 5, 11, 14, 16).

This is a fictitious issue. The fact is that the Appellate Division never made any determination, preliminary or otherwise, with respect thereto. Its order instituting the preliminary investigation is dated August 12, 1966; it thus could not have been based upon petitioner's statements to the press made subsequently between August 15 and August 20, 1966 (OP. Items 1 and 2).

Moreover, the Appellate Division struck out that charge together with eight other charges and deleted them from consideration without passing upon either their merits or sufficiency (OP. Item 12).

Finally, it would be a unique device if one who is subject to the supervision of a court could disqualify every Justice thereof simply by making statements to the press disparaging the court.

3.

The petition is replete with assertions and argument as to the tapped telephone conversations and petitioner's claim of privilege against self-incrimination in connection therewith. This is a non-existant issue. As heretofore noted the Appellate Division dismissed the charge and completely disregarded the claim of privilege in accordance with the decision of the Court of Appeals.

4.

Petitioner further contends that the Appellate Division acted as grand jury, prosecutor and judge; and that the provisions of the State Constitution and statutes authorizing removal for "cause" is vague and indefinite in violation of due process of law.

These contentions are not new. They were raised and rejected in *Matter of Friedman,* 12 NY 2d (a), appeal dismissed 375 US 10; *Matter of Osterman,* 13 NY 2d (a), cert. denied 376 US 914; *Matter of Kane* v. *Rudich,* 256 App. Div. 586; *Matter of Newman* v. *Strobel,* 236 App. Div. 371.

Petitioner made the same contentions in a separate action brought in the United States District Court for the Eastern District of New York before the trial in the instant proceeding. The opinion, rejecting his contentions, contains a thorough discussion of the decided cases and demonstrates the insubstantiality of the issues sought to be raised. *Sarisohn* v. *Appellate Division,* 265 F. Supp. 455.

5.

Petitioner's complaint (Pet. 11) that the Appellate Division "discharged the impartial referee it had appointed to

conduct the hearing . . . and substituted itself for the impartial referee" needs little discussion.

The record shows that the Appellate Division referred the matter to Hon. Daniel Gutman, Dean of the New York Law School, as Referee to hear the proofs on the issues presented and to deliver to the court a certified transcript of the hearings. This was done in accordance with the procedure authorized by section 132 of the New York Code of Criminal Procedure.

Petitioner, however, objected to the reference. The Court therefore vacated the order of reference and designated five Justices of the Court to hear and determine the issues.

6.

Finally, a reading of the record and opinions of the Court of Appeals and the Appellate Division shows that the judgment removing and barring petitioner from holding judicial office rests upon adequate State grounds, and that petitioner was not deprived of any right guaranteed to him by the Federal Constitution (See *Wilson* v. *North Carolina,* 169 US 586).

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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